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Aktif Perunding Sdn Bhd v ZNVA & Associates Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — SUIT NO 22IP-33–06 OF 2015
WONG KIAN KHEONG JC
27 APRIL 2017

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Copyright — Infringement — Ownership of copyright — Plaintiff sued defendant for infringement of copyright — Whether main contractor owned copyright in drawings under s 26(2)(a) of the Copyright Act 1987 — Whether plaintiff author of drawings — Whether plaintiff owner of copyright — Whether plaintiff had moral rights on drawings under s 26(2)(a) of the Act — Whether defendant committed fraud on plaintiff — Copyright Act 1987 ss 25 & 26 — Evidence Act 1950 ss 101 & 102

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Universiti Teknologi Malaysia ('UTM') had appointed Ahmad Zaki Sdn Bhd ('main contractor') as the main contractor for the construction of UTM's student accommodation in Kuala Lumpur ('project'). The plaintiff was then appointed by the main contractor vide a letter of intent dated 27 September 2013 ('letter of intent'), as the mechanical and electrical engineering consultant ('consultant') for the project. As consultant for the project, the plaintiff had produced certain mechanical and electrical engineering drawings ('drawings'). In the 'Title Block' of the drawings ('title block'), it was stated, inter alia, that the plaintiff was the mechanical and electrical engineer ('M & E Engineer') for the project. The main contractor terminated the plaintiff as the consultant and appointed the defendant as the new consultant for the project. The present suit was brought by the plaintiff against the defendant on two grounds: (a) the defendant had infringed the plaintiff's moral rights in the drawings under s 25(2) of the Copyright Act 1987 ('the Act'); and (b) the defendant had defrauded the plaintiff. The issues arose were: (i) whether the main contractor owned copyright in the drawings under s 26(2)(a) of the Act because the main contractor had commissioned the plaintiff to prepare drawings; and whether the statement in the title block that the plaintiff was the M & E Engineer, constituted evidence that the plaintiff was the author of the drawings and was thereby the owner of the copyright in the drawings pursuant to s 26(a) of the Act; (ii) whether the plaintiff had moral rights in the drawings under s 25(2)(a), (b)(i) and (ii) of the Act on the ground that the plaintiff was the author of the drawings; and (iii) whether the defendant committed fraud on the plaintiff by replacing the plaintiff's name as M & E Engineer in the title block with the defendant's name and by subsequently using the drawings for the project without the plaintiff's knowledge and consent.

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Held, dismissing the suit with costs:

(1) The letter of intent constituted a 'commission' under s 26(2) of the Act by the main contractor to the plaintiff to produce the drawings. As the main contractor had commissioned the plaintiff to prepare the drawings, therefore, the main contractor (not the plaintiff) had copyright in the drawings under s 26(2)(a) of the Act. The contents of the title block could not lawfully deprive the main contractor of the copyright because the main contractor had copyright in the drawings by reason of operation of law (see paras 33(d), 34 & 53(a)).

(2) The court held that s 25(2)(a), (b)(i) and (ii) of the Act only conferred moral rights in a work on its author who was a natural person. This was based on the following reasons: (a) the express reference to the author's death and the author's personal representative in s 25(2), (4), (5) and (6) of the Act showed the Parliament's intention to confine moral rights in s 25 of the Act to an individual author only; (b) the word 'honour' as used in s 25(2)(b)(ii) of the Act could only refer to an author who was a natural person; and (c) the entire provision of s 25 of the Act did not refer at all to the winding up or dissolution of a corporate author. Accordingly, the plaintiff could not have moral rights in the drawings under s 25(2)(a), (b)(i) and (ii) of the Act which could be breached by the defendant (see paras 43 & 53(b)).

(3) The plaintiff had failed to discharge the legal burden under ss 101(1), (2) and 102 of the Evidence Act 1950 to prove the allegation of fraud on a balance of probabilities. This finding was based on the following evidence and reasons: (a) the plaintiff had no moral rights in the drawings; (b) the main contractor had copyright in the drawings and the main contractor was the party who could rightfully complain regarding the defendant's amendment of the title block; (c) the main contractor knew that the plaintiff had prepared the drawings, as such, they could not had been deceived by the defendant's amendment of the title block; and (d) the defendant was only carrying out its duties owed to the main contractor and there was therefore no evidence of actual dishonesty on the part of defendant. In addition to the above findings, the plaintiff had not adduced any evidence to prove that the defendant's amendment to the title block and the subsequent use of drawings had caused any loss or damage to the plaintiff's income, business, goodwill and/or reputation (see paras 51–52 & 53(c)).

[Bahasa Malaysia summary

Universiti Teknologi Malaysia ('UTM') telah melantik Ahmad Zaki Sdn Bhd ('kontraktor utama') sebagai kontraktor utama untuk pembinaan penginapan pelajar UTM di Kuala Lumpur ('projek'). Plaintif kemudian dilantik oleh kontraktor utama tersebut melalui surat niat bertarikh 27 September 2013 ('surat niat'), sebagai konsultan kejuruteraan mekanik dan elektrik ('konsultan') bagi projek tersebut. Sebagai konsultan untuk projek tersebut,

plaintif telah mengemukakan lukisan-lukisan kejuruteraan mekanik dan elektrik yang tertentu ('lukisan tersebut'). Dalam 'Title Block' lukisan tersebut ('blok tajuk'), ia menyatakan, antara lain, bahawa plaintif adalah jurutera mekanik dan elektrik ('Jurutera M & E') untuk projek tersebut. Kontraktor utama tersebut telah menamatkan plaintif sebagai konsultan dan melantik defendan sebagai konsultan baru untuk projek tersebut. Guaman ini telah dimulakan oleh plaintif terhadap defendan atas dua alasan: (a) defendan telah melanggar hak moral plaintif dalam lukisan tersebut di bawah s 25(2) Akta Hak Cipta 1987 ('Akta tersebut'); dan (b) defendan telah menipu plaintif. Isu-isu yang timbul adalah: (i) sama ada kontraktor utama tersebut memiliki hak cipta dalam lukisan tersebut di bawah s 26(2)(a) Akta tersebut kerana kontraktor utama telah mengkomisenkan plaintif untuk menyediakan lukisan tersebut; dan sama ada kenyataan dalam blok tajuk yang mana plaintif adalah Jurutera M & E, merupakan keterangan bahawa plaintif adalah pengarang lukisan tersebut dan dengan itu pemilik kepada hak cipta lukisan tersebut menurut s 26(a) Akta tersebut; (ii) sama ada plaintif mempunyai hak moral dalam lukisan tersebut di bawah s 25(2)(a), (b)(i) dan (ii) Akta tersebut atas alasan bahawa plaintif adalah pengarang lukisan tersebut; dan (iii) sama ada defendan telah melakukan penipuan ke atas plaintif dengan menggantikan nama plaintif sebagai Jurutera M & E dalam blok tajuk tersebut dengan nama defendan dan dengan kemudiannya menggunakan lukisan tersebut untuk projek tersebut tanpa pengetahuan dan persetujuan plaintif.

Diputuskan, menolak guaman dengan kos:

(1) Surat niat tersebut merupakan 'commission' di bawah s 26(2) Akta tersebut oleh kontraktor utama kepada plaintif untuk mengemukakan lukisan tersebut. Oleh kerana kontraktor utama telah mengkomisenkan plaintif untuk menyediakan lukisan tersebut, dengan itu, kontraktor utama tersebut (bukan plaintif) mempunyai hak cipta dalam lukisan tersebut di bawah s 26(2)(a) Akta tersebut. Kandungan blok tajuk tersebut tidak mungkin dari segi perundangan menafikan kontraktor utama berhubung hak cipta kerana kontraktor utama mempunyai hak cipta dalam lukisan tersebut oleh sebab operasi undang-undang (lihat perenggan 33(d), 34 & 53(a)).

(2) Mahkamah memutuskan bahawa s 25(2)(a), (b)(i) dan (ii) Akta tersebut hanya memberikan hak-hak moral dalam kerja pengarangnya yang merupakan orang semulajadi. Ini adalah berdasarkan sebab-sebab berikut: (a) rujukan nyata kepada kematian pengarang dan wakil peribadi pengarang dalam s 25(2), (4), (5) dan (6) Akta tersebut menunjukkan niat Parlimen untuk membataskan hak-hak moral dalam s 25 Akta tersebut kepada pengarang individu sahaja; (b) perkataan 'honour' sebagaimana digunakan dalam s 25(2)(b)(ii) Akta tersebut hanya boleh merujuk kepada pengarang yang merupakan orang semulajadi; dan (c) keseluruhan

peruntukan s 25 Akta tersebut tidak merujuk langsung kepada penggulungan atau pembubaran pengarang korporat. Sewajarnya, plaintif tidak boleh mempunyai hak-hak moral dalam lukisan tersebut di bawah s 25(2)(a), (b)(i) dan (ii) Akta tersebut yang boleh dilanggari oleh defendan (lihat perenggan 43 & 53(b)).

(3) Plaintif telah gagal melepaskan beban undang-undang di bawah ss 101(1), (2) dan 102 Akta Keterangan 1950 untuk membuktikan dakwaan penipuan atas imbangan kebarangkalian. Dapatan ini adalah berdasarkan keterangan dan sebab-sebab berikut: (a) plaintif tidak mempunyai hak-hak moral dalam lukisan tersebut; (b) kontraktor utama tersebut mempunyai hak cipta dalam lukisan tersebut dan kontraktor utama merupakan pihak yang boleh dengan sewajarnya mengadu berkenaan pindaan defendan kepada blok tajuk tersebut; (c) kontraktor utama tersebut mengetahui bahawa plaintif telah menyediakan lukisan tersebut, oleh itu, mereka tidak mungkin telah ditipu oleh penipuan defendan berhubung blok tajuk tersebut; dan (d) defendan hanya menjalankan kewajipannya kepada kontraktor utama dan dengan itu tiada keterangan berhubung ketidakjujuran sebenar di pihak defendan. Selain daripada dapatan di atas, plaintif tidak mengemukakan apa-apa keterangan untuk membuktikan bahawa pindaan defendan kepada blok tajuk tersebut dan kemudian penggunaan lukisan tersebut telah menyebabkan apa-apa kehilangan kepada atau menjejaskan pendapatan, perniagaan, nama baik dan/atau reputasi plaintif (lihat perenggan 51–52 & 53(c)).]

Notes

For a case on ownership of copyright, see 3(4) *Mallal's Digest* (5th Ed, 2015) para 7629.

Cases referred to

Apple Corps Ltd v Cooper [1993] FSR 286, Ch D (refd)

Dura-Mine Sdn Bhd v Elster Metering Ltd & Anor [2015] 3 MLJ 1; [2015] 1 CLJ 887, FC (refd)

Kesultanan Pahang v Sathask Realty Sdn Bhd [1998] 2 MLJ 513; [1998] 2 CLJ 559, FC (refd)

Pacific Software Technology Ltd and Another v Perry Group Ltd and Another [2004] 3 LRC 167, CA (refd)

PJTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd [1980] 2 MLJ 136, FC (refd)

Plix Products Ltd v Frank M Winstone (Merchants) [1986] FSR 63, HC (refd)

PS Johnson & Associates Ltd v Bucko Enterprises Ltd and others [1975] 1 NZLR 311, SC (refd)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 5 AMR 497, FC (refd)

Syed Ahmad bin Jamal v Dato Bandar Kuala Lumpur [2010] MLJU 1015; [2011] 2 CLJ 569, HC (refd)
Tai Choi Yu v Ian Chin Hon Chong [2002] 5 MLJ 518, HC (refd)
TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd [1985] 2 MLJ 45; [1984] 2 CLJ 488, FC (refd)
Ultraframe (UK) Ltd v Fielding [2004] RPC 479, CA (refd)
Yeoh Kee Aun v PI Capital Asset Management Sdn Bhd & Anor [2000] 4 MLJ 508; [2000] 1 LNS 132, HC (refd)

Legislation referred to

Building (Federal Territory of Kuala Lumpur) By-Laws 1985 by-laws 4, 6, 7, 8
Companies Act 1965
Copyright Act 1956 [UK] s 4(3)
Copyright Act 1957 [IND] s 57
Copyright Act 1962 [NZ] s 9(3)
Copyright Act 1968 [AUS] ss 189, 190, 191, 192, 193, 194, 195, Part IX
Copyright Act 1987 ss 3, 3(a), (b), (c), (d), (e), (f), (g), (h), 7(1)(c), (3)(a), (3)(b), 10, 10(1), (2)(a), (3), 25, 25(2), (2)(a), (2)(b)(i), (2)(b)(ii), (4), (5), (6), 26, 26(1), (2), (2)(a), (2)(b), (4)(a)
Copyright Act 1994 [NZ] ss 21(3), 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, Part 4
Copyright, Designs and Patents Act 1988 [UK] ss 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 215(2), 263(1)
Copyright Act [CN] s 14
Copyright Act [SG] ss 187, 188, 189, 190, 191, 192, 193, Part IX
Evidence Act 1950 ss 101(1), (2), 102
Interpretation Acts 1948 and 1967 ss 2(1)(a), (3)(b), 3
Registration of Engineers Act 1967 ss 2, 3(1), 4(1)(f), 14A(1), 20
Registration of Engineers Regulations 1990 reg 24
Sultanate Lands Enactment 1919 s 6(i)(b)
Uniform Building By-Laws 1984

Rajindar Singh Veriah s/o Kaher Singh (Clinton Nicholas Gomez with him) (Rajindar Singh Veriah & Co) for the plaintiff.
K Selva Kumaran (Amelda bt Md Din and Nur Izzaida bt Zamani with him) (Amelda & Partners) for the defendant.
Richard Kok Chi Wei (Azlan bin Hamidi with him) (Rhiza & Richard) as amicus curiae.

Wong Kian Kheong JC:

A. INTRODUCTION

[1] This case discussed the novel question of whether a company has 'moral rights' in a work under s 25(2) of the Copyright Act 1987 ('the CA').

[2] Universiti Teknologi Malaysia ('UTM') had appointed Ahmad Zaki Sdn Bhd ('main contractor') as the main contractor for the construction of UTM's student accommodation in Kuala Lumpur ('project').

[3] The plaintiff company ('the plaintiff') was appointed by the main contractor as the mechanical and electrical engineering consultant ('consultant') for the project. As consultant, the plaintiff had produced certain mechanical and electrical engineering drawings ('drawings'). In the 'Title Block' of the drawings ('title block'), it was stated, among others, that the plaintiff was the mechanical and electrical engineer ('M & E Engineer') for the project.

[4] The plaintiff's appointment as consultant was subsequently terminated by the main contractor and the defendant company ('the defendant') was appointed by the main contractor as the consultant.

B. ISSUES

[5] The following questions, among others, arise in this case:

(a) who is the owner of copyright in the drawings? This issue concerns:

(i) whether the main contractor owns copyright in the drawings under s 26(2)(a) of the CA because the main contractor had commissioned the plaintiff to prepare the drawings; and

(ii) whether the statement in the title block that the plaintiff was the M & E Engineer, constituted evidence that the plaintiff was the author of the drawings and was thereby the owner of the copyright in the drawings pursuant to s 26(1) of the CA;

(b) if the plaintiff has no copyright in the drawings, does the plaintiff have moral rights in the drawings under s 25(2)(a), (b)(i) and (ii) of the CA on the ground that the plaintiff is the author of the drawings? This will entail a discussion on whether s 25 of the CA can confer moral rights on an author of a work which is a company; and

(c) did the defendant commit fraud on the plaintiff by, among others, replacing the plaintiff's name as M & E Engineer in the title block with the defendant's name and by subsequently using the drawings for the

project without the plaintiff's knowledge and consent? In deciding whether the defendant had defrauded the plaintiff in this case, can the court consider the fact that Encik Muhammad bin Uda ('Encik Muhammad'), the defendant's director and mechanical engineer, had been found guilty of a disciplinary offence in respect of the project by the disciplinary committee ('DC') (constituted under s 14A(1) of the Registration of Engineers Act 1967 ('the REA'))?

C. BACKGROUND

[6] The main contractor's 'letter of intent' dated 27 September 2013 to the plaintiff stated, among others, as follows:

(a) the main contractor expressed its intention to appoint the plaintiff as consultant; and

(b) the main contractor and plaintiff would negotiate on the terms to be included in the agreement between the main contractor and plaintiff.

The plaintiff agreed to the main contractor's letter of intent by signing on the letter of intent.

[7] As the consultant, the plaintiff had carried out mechanical and electrical engineering works for the project. For this purpose, the plaintiff's representatives were required to meet UTM's employees ('meetings').

[8] The plaintiff's director and mechanical engineer, Encik Sjaiful Anwar bin Sjamsuddin ('Encik Sjaiful'), could not attend the meetings. As the main contractor wanted the consultant's engineers to attend the meetings, the main contractor introduced Encik Muhammad to the plaintiff and recommended for Encik Muhammad to assist the plaintiff in the project.

[9] The plaintiff appointed Encik Muhammad to assist the plaintiff in the project as the plaintiff's 'associate director'. Encik Muhammad had assisted the plaintiff in the project by:

(a) assisting plaintiff's team of engineers to prepare the drawings; and

(b) attending meetings on behalf of the plaintiff.

[10] The plaintiff completed the drawings and handed the drawings to the main contractor.

[11] In early November 2013, before the completion of the project, the main contractor's general manager (Mechanical and Engineering Division), Encik Nazarul bin Hashim ('Encik Nazarul'), had orally informed

A Encik Mohd Mazlan bin Baharuddin ('Encik Mazlan'), the plaintiff's managing director and electrical engineer, that the main contractor had decided to terminate the appointment of the plaintiff as the consultant ('termination'). Encik Mazlan then informed Encik Nazarul that the main contractor was required to pay to the plaintiff an 'abortive fee' as a result of the termination.

[12] The plaintiff sent a letter dated 6 November 2013 to the main contractor which stated that the main contractor should pay RM933,722.52 to the plaintiff as the plaintiff's 'abortive fee' due to the termination. The plaintiff then informed the main contractor by a letter dated 10 December 2013 that the plaintiff would reduce the plaintiff's 'abortive fee' to RM300,000.

[13] By a letter dated 10 December 2013, the main contractor informed the plaintiff of the termination and consequently:

(a) the plaintiff should forward 'all designs, drawings and other documents and materials related to the project' ('project documents') to the main contractor;

(b) all intellectual property in the project documents belonged to the main contractor; and

(c) as a 'token of appreciation', the main contractor would only reimburse the plaintiff with a sum of RM120,000 only.

[14] The plaintiff sent a letter dated 12 December 2013 to the main contractor which stated, among others:

(a) the plaintiff would insist on RM933,722.52 as the plaintiff's 'abortive fee'; and

(b) the main contractor had no right to use the project documents as the plaintiff had intellectual property in the project documents. The main contractor could only use the project documents when the plaintiff issued a 'letter of release' after the main contractor had agreed on the plaintiff's 'abortive fee'.

[15] The plaintiff refused to issue a letter of release which would enable the main contractor to appoint another M & E Engineer ('second engineer') to replace the plaintiff as consultant. In view of the dispute between the main contractor and the plaintiff ('dispute'), the main contractor applied to the board of engineers ('the board') by way of a letter dated 8 May 2014 for:

(a) the board to act as a stakeholder regarding fees to be paid by main contractor to plaintiff ('stakeholder'). For this purpose, the main contractor proposed to deposit a sum of RM120,000 with the board; and

(b) the board to appoint a mediator to resolve the dispute.

[16] By way of a letter dated 24 June 2014, the board informed the main contractor that the board would act as a stakeholder in the dispute if the main contractor would deposit a sum of RM300,000 ('sum') with the board. The main contractor subsequently deposited the sum with the board.

[17] The board sent a letter dated 14 July 2014 to the plaintiff which stated, among others:

(a) as the main contractor had deposited the sum with the board, the plaintiff was directed to issue a letter of release to the main contractor; and

(b) the board would release the sum upon receipt a final arbitral award regarding the dispute.

[18] The plaintiff issued a letter of release dated 17 July 2014 to enable the main contractor to appoint the second engineer.

[19] The plaintiff did not know that:

(a) the main contractor had appointed the defendant as the second engineer of the project;

(b) the defendant had replaced the plaintiff's name as M & E Engineer in the title block with the defendant's name; and

(c) the defendant had used the drawings for the project.

[20] The plaintiff had complained to the board that Encik Muhammad had acted as the second engineer of the project without the plaintiff's consent and the plaintiff's letter of release. The DC had found Encik Muhammad guilty of a disciplinary offence and had punished him as follows:

(a) Encik Muhammad's registration as a 'registered person' (defined in s 2 of the REA) had been suspended for six months; and

(b) Encik Muhammad had been imposed a fine of RM30,000.

('DC's decision')

Encik Muhammad did not appeal to the appeal board (constituted under s 20 of the REA) against the DC's decision.

D. THIS SUIT

[21] In this action, the plaintiff claimed for damages from the defendant on the following two grounds:

(a) the defendant had infringed the plaintiff's moral rights in the drawings under s 25(2) of the CA; and

(b) the defendant had defrauded the plaintiff by, among others, replacing the plaintiff's name as M & E Engineer in the title block with the defendant's name and by subsequently using the drawings in the project without the plaintiff's knowledge and consent.

E. INVITATION OF BOARD AS AMICUS CURIAE

[22] During the trial of this case, I realised that the view of the board on the nature and importance of title block, was needed to decide this case justly. I then invited learned counsel for the plaintiff and the defendant to consider whether this court should invite the board's learned counsel as an amicus curiae in this case.

[23] Mr Rajindar Singh Veriah, learned counsel for the plaintiff ('Mr Rajindar'), and Mr K Selva Kumaran, the defendant's learned counsel (' Mr Selva '), agreed to the court's proposal to invite the board's learned counsel as an amicus curiae in this case. Mr Rajindar and Mr Selva further agreed for seven questions to be presented for the board's view ('seven questions').

[24] The seven questions are:

(a) what is the purpose and function of a title block?

(b) what is the effect of a letter of release and does it have retrospective effect?

(c) whether a title block constitutes a reservation of an author's rights in the drawings;

(d) whether the author of the drawings is the name of the:

(i) engineer in the title block; or

(ii) person stated in the description 'Drawn By' ('dilukis oleh');

(e) if the answer to the above fourth question is 'yes', whether a change of the name in the title block constitutes a breach of the author's moral rights under s 25 of the CA;

(f) if the answer to the above fifth question is 'yes', whether existing law,

among others, reg 24 of the Registration of Engineers Regulations 1990 ('the RER'), by-law 4 of the Building (Federal Territory of Kuala Lumpur) By-Laws 1985 ('By-Laws (KL)') and Uniform Building By-Laws 1984 ('the UBBL'), provide a complete defence to the defendant for failing to acknowledge that the original author of the drawings was the plaintiff; and

(g) whether a principal of the second engineer (appointed by the main contractor), can sign the drawings under the plaintiff's title block in order to comply with By-Laws (KL) and by-law 7 of the UBBL.

[25] It is not disputed that the court has the power to invite a learned counsel to be an amicus curiae (friend of the court). I refer to Sulaiman Daud JC's (as he then was) decision in the High Court case of *Tai Choi Yu v Ian Chin Hon Chong* [2002] 5 MLJ 518 at pp 523–524, as follows:

> *Who is an amicus curiae? In P Ramanatha Aiyar's The Law Lexicon (2nd Ed 1997), amicus curiae is defined as a friend of the court, being a person who voluntarily or on invitation of the court, and not on the instruction of any party helps the court in any judicial proceedings.* (Emphasis added.)

[26] I exercise my discretion to invite the board's learned counsel to act as an amicus curiae in this case ('the court's invitation') for the following reasons:

(a) I am not able to find any previous Malaysian case which has decided on the effect of title block on the authorship and ownership of copyright in the drawings;

(b) a decision regarding the effect of title block on the authorship and ownership of copyright in the drawings, will have an effect on the engineering profession in particular and the construction industry in general;

(c) the board is a statutory body established under s 3(1) of the REA with the function, among others, 'to determine and regulate the conduct and ethics of the engineering profession' (s 4(1)(f) of the REA). Accordingly, the board is the appropriate entity to assist this court on whether the title block has any effect on the authorship and ownership of copyright in the drawings; and

(d) both parties in this case have agreed to the court's invitation. In fact, the parties' learned counsel have agreed for seven questions to be presented for the board's view.

[27] Based on the above reasons, I directed my learned deputy registrar to issue the court's invitation. The board had kindly accepted the court's

A invitation and had appointed Mr Richard Kok Chi Wei ('Mr Kok') to act as an amicus curiae in this case. Consequently, Mr Kok had filed a written submission on the seven questions.

F. WHO HAS COPYRIGHT IN DRAWINGS?

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F(1). Eligibility for copyright

[28] The drawings do not constitute a 'literary work' within the meaning of s 3(a)–(h) of the CA. The drawings however fall within the meaning of a C 'graphic work' in s 3(a) of the CA (drawing). In s 3(a) of the CA, 'artistic work' means, among others, a graphic work. Accordingly, the drawings constitute an 'artistic work'. In the Federal Court case of *Dura-Mine Sdn Bhd v Elster Metering Ltd & Anor* [2015] 3 MLJ 1; [2015] 1 CLJ 887 at para 14, Jeffrey Tan FCJ held as follows:

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> [14] *It is settled that technical drawings are artistic works eligible for copyright (see Lau Foo Sun v Government of Malaysia* [1974] 1 MLJ 28*; TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45; [1984] 2 CLJ 488*; and Peko Wallsend Operations Ltd & Ors v Linatex Process Rubber Bhd and another action* [1993] 1 MLJ 225*).* (Emphasis added.)

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[29] I am satisfied that the drawings are eligible for copyright. This decision is based on the following reasons:

F (a) the drawings is an 'artistic work' which is eligible for copyright under s 7(1)(c) of the CA;

(b) there is evidence adduced in this case to show that the plaintiff has expended sufficient effort to make the drawings 'original in character' within the meaning of s 7(3)(a) of the CA; and

G (c) as required by s 7(3)(b) of the CA, the drawings have been reduced to 'material form' (as defined in s 3 of the CA).

F(2). Whether copyright subsists in drawings

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[30] It is clear that copyright subsists in the drawings due to one or more of the following reasons:

(a) as explained below, the author of the drawings was the plaintiff. Section 10(1) of the CA provides that copyright shall subsist in a work I eligible for copyright when the author is a 'qualified person'. In relation to a body corporate, s 3(b) of the CA defines a 'qualified person' as 'a body corporate established in Malaysia and constituted or vested with legal personality under the laws of Malaysia'. It is clear that the plaintiff, as a private limited company incorporated under the Companies Act

1965, is a 'qualified person' within the meaning of s 3(b) of the CA. As such, copyright subsists in the drawings by virtue of s 10(1) of the CA;

(b) according to the plaintiff's evidence, the drawings were first published in Malaysia. Hence, copyright subsists in the drawings under s 10(2)(a) of the CA; *and/or*

(c) it is not disputed that the drawings were made in Malaysia. Hence, copyright subsists in the drawings pursuant to s 10(3) of the CA.

F(3). Who was author of drawings?

[31] The relevant part of s 26 of the CA is reproduced as follows:

> 26 *First ownership of copyright*
>
> (1) *Copyright conferred by section 10 shall vest initially in the author.*
>
> (2) Notwithstanding subsection 27(6), *where a work* —
>
> (a) *is commissioned by a person who is not the author's employer under a contract of service* or apprenticeship; or
>
> (b) not having been so commissioned, is made in the course of the author's employment,
>
> *the copyright shall be deemed to be transferred to the person who commissioned the work or the author's employer, subject to any agreement between the parties excluding or limiting such transfer.*
>
> (3) Copyright conferred by section 11 shall vest initially in the Government, Government organization or international body and not in the author.
>
> (4) Subject to subsection (3) —
>
> (a) *the name on a work purporting to be the name of its author shall be considered as such, unless the contrary is proved;*
> ... (Emphasis added.)

[32] I am satisfied that the plaintiff was the 'author' of the drawings for the following reasons:

(a) the plaintiff had given evidence that the plaintiff's engineering team was the 'artist' of the drawings within the meaning of the term 'author' in s 3(c) of the CA; and

(b) the title block initially stated the plaintiff's name as M & E Engineer. As rightly submitted by Mr Kok, a title block provides information on the ownership and authorship of the drawing in question. Accordingly, the plaintiff was the 'author' of the drawings according to s 26(4)(a) of the CA.

F(4). Whether the plaintiff or main contractor has copyright in drawings

[33] Despite the fact that the plaintiff is the author of the drawings, I am of the view that the main contractor owns the copyright in the drawings. This decision is premised on the following reasons:

(a) s 26(1) of the CA provides that copyright conferred by s 10 of the CA 'shall vest initially in the author'. It is clear that authorship of a work does not conclusively vest copyright in the author. It was decided in *Dura-Mine*, in para 13, as follows:

> [13] *When read together, ss 7, 10 and 26(1), provide that ownership of the copyright of a work eligible for copyright shall subsists initially with the author*. (Emphasis added.);

(b) there are two circumstances provided by s 26(2)(a) and (b) of the CA wherein an author of a work does not have copyright in the work. I cite the judgment of Steve LK Shim J (as he then was) in the High Court case of *Yeoh Kee Aun v PI Capital Asset Management Sdn Bhd & Anor* [2000] 4 MLJ 508 at p 515; [2000] 1 LNS 132 at p 12 as follows:

> *A person can be an author of a copyright work and yet does not own it. This is evident from s 26 of the Copyright Act which states that an employee who is the author of a copyright is not the owner of the copyright if the subject copyright is made in the course of the author's employment or pursuant to a commission.* (Emphasis added.);

(c) the word 'commissioned' in s 26(2) of the CA is not defined in CA. I refer to the following cases from New Zealand ('NZ') and United Kingdom ('UK') which have explained the word 'commissioned' in their legislation:

(i) *PS Johnson & Associates Ltd v Bucko Enterprises Ltd and others* [1975] 1 NZLR 311 is a decision of Chilwell J in the Supreme Court of NZ (at that time, the Supreme Court of NZ was a court of first instance) regarding the interpretation of the then s 9(3) of the Copyright Act 1962 (NZ) ('the CA 1962 (NZ)'). Section 9(3) of the CA 1962 (NZ) provided as follows:

> Subject to subsection (2) of this section, *where a person commissions the taking of a photograph, or the making of a painting, drawing, engraving, or sculpture and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, the person who so commissioned the work shall be entitled to any copyright subsisting therein by virtue of this Part of this Act.* (Emphasis added.)

The word 'commission' was not defined in CA 1962 (NZ) and had been explained in *Johnson & Associates Ltd* at pp 317–318, as follows:

> However, *it does not seem to me to be necessary to apply strict contractual conceptions to the interpretation of* s 9(3) of the CA 1962 (NZ). *The verb*

'commission' is defined in the Shorter Oxford English Dictionary as follows:

(1) To furnish with a commission or legal warrant.

(2) To empower; to entrust with an officer or duty.

(3) To send on a mission.

(4) *To give a commission or order to or for.*

The evidence is as plain as can be that Mr Johnson, acting for his company, placed an order for the product drawing: the company accordingly commissioned it. The company also quite definitely paid for it. *The product drawing was made in pursuance of that commission. In my judgment, applying the ordinary meaning of the words of* s 9(3) *to the facts of this case, it is perfectly plain that the plaintiff company is entitled to the copyright subsisting in the product drawing*. (Emphasis added);

(ii) in *Plix Products Ltd v Frank M Winstone (Merchants)* [1986] FSR 63 at p 86, Prichard J decided as follows in the High Court of NZ regarding the meaning of 'commission' in s 9(3) of the CA 1962 (NZ):

Without proof of a prior commissioning, payment for the work — in whatever form — is of no consequence. Commissioning means ordering. In this context it means more than requesting or encouraging. It connotes an obligation to pay. Not just to pay for the finished products if and when they are purchased, but to pay for the very article in which the copyright resides irrespective of whether any of the finished products are purchased. (Emphasis added.)

The above decision by Prichard J had been affirmed on appeal by the Court of Appeal of NZ in [1986] FSR 608 (except for a variation of the injunction granted by Prichard J);

(iii) Prichard J's decision regarding the meaning of 'commission' in *Plix Products*, has been followed by the following cases in UK:

(1) Mickleham J's judgment in the High Court case of *Apple Corps Ltd v Cooper* [1993] FSR 286 at p 298, regarding the then s 4(3) of UK's Copyright Act 1956 ('the CA 1956 (UK')). Section 4(3) of the CA 1956 (UK) is similar to s 9(3) of the CA 1962 (NZ); and

(2) the decision of Waller LJ (as he then was) in the Court of Appeal in *Ultraframe (UK) Ltd v Fielding* [2004] RPC 479, at paras 29–33. It is to be noted that *Ultraframe* concerned the meaning of the word 'commission' (defined in s 263(1) of the UK's Copyright, Designs and Patents Act 1988 ('the CDPA')) which is used in s 215(2) of the CDPA (regarding the ownership of 'design right');

(iv) *Pacific Software Technology Ltd and Another v Perry Group Ltd and Another* [2004] 3 LRC 167 is a judgment of NZ's Court of Appeal delivered by Hammond J regarding the present s 21(3) of the Copyright

Act 1994 ('the CA 1994 (NZ)'). Section 21(3) of the CA 1994 (NZ) provides as follows:

> 21(3) Where:
>
> *(a) A person commissions, and pays or agrees to pay for, the taking of a photograph or the making of a computer program, painting, drawing, diagram, map, chart, plan, engraving, model, sculpture, film, or sound recording; and*
>
> *(b) The work is made in pursuance of that commission, —*
>
> *that person is the first owner of any copyright in the work*. (Emphasis added.)

(v) in *Pacific Software Technology*, at paras 52–60, Hammond J explained the term 'commission' in s 21(3) of the CA 1994 (NZ) as follows:

> [52] *Whether a work is 'commissioned'; what the scope of that commission is; and the date on which the commission arises are all necessarily questions of fact in each case*.
>
> [53] *Patently, the better practice is to have a written agreement*, and software developers and purchasers would be well advised to see that sound industry contracting procedures are put in place. Be that as it may, inevitably there will be cases, such as the present, in which the exigencies of the moment, or a lack of 'best practice' will see parties fail to attend to the obvious.
>
> [54] Where there is no specific agreement, the law is now well settled, although it can be difficult to apply.
>
> [55] First, *to 'commission' simply means to 'order' or 'request'.*
>
> [56] Secondly, *this commissioning must be antecedent to the work. It must have been arrived at before the work is made*.
>
> [57] Thirdly, s 21 requires, in terms, a commission and an agreement to pay. Whilst an antecedent commissioning does not necessarily imply an obligation to pay, usually it will do so. And the very existence of a payment obligation can lend force to the notion of the commission itself. An agreement to pay can be express or implied. In *Alwinco Products Ltd v Crystal Glass Industries Ltd* [1985] 1 NZLR 716, this Court thought it sufficient that it be established that the work is to be paid for. *For the purposes of a commission there need not necessarily be agreement as to the precise amount to be paid. And the authors of Laddie, Prescott and Vitoria, The Modern Law of Copyright and Designs, Vol 1 (2nd Ed, 1995) at para 11.50 cite with approval PS Johnson & Associates Ltd v Bucko Enterprises Ltd and others* [1975] 1 NZLR 311 *for the proposition that there can be an implied commissioning arrangement 'where it can only be assumed that [the work] would ultimately be paid for'. That said, matters can be left so vague that the supposed commission becomes unenforceable. (For a reported instance of this kind, see Leah v Two Worlds Publishing Co Ltd* [1951] Ch 393).
>
> [58] Fourthly, *this payment is a quid pro quo for the copyright: that is, the*

making of the copyright work, not the physical embodiment of the work itself.

[59] Fifthly, *the copyright in the commissioned work belongs to the commissioning party so soon as part of it is done. That is, the commission applies to incomplete as well as complete works*.

[60] Sixthly, it will be apparent from the foregoing that *although it is an agreement of a kind, a commission is closer to a term of art which is employed in the copyright area for the resolution of first ownership issues. To put this another way, the notion of a commission is sui generis to copyright law. It involves the Court finding an arrangement of the requisite character between the parties, and what the terms of it are. The very existence of the commission may be inferred.* (Emphasis added.)

(c) subject to one caveat, I am of the view that the above New Zealand cases on the meaning of 'commission' can be resorted to in the interpretation of the word 'commissioned' in our s 26(2) of the CA. The caveat is that s 9(3) of the CA 1962 (NZ) and s 21(3) of the CA 1994 (NZ) provide for an additional statutory requirement (payment or agreement to pay by the commissioning party to the author of the work in question) ('additional requirement'). Our s 26(2) of the CA does not have the additional requirement;

(d) I make a finding of fact that the main contractor's letter of intent dated 27 September 2013 (accepted by the plaintiff) constituted a 'commission' under s 26(2) of the CA by the main contractor to the plaintiff to produce the drawings. This finding is supported by the following reasons:

(i) there was no express contract between the main contractor and plaintiff that the copyright in the drawings would vest in the plaintiff;

(ii) the main contractor's letter of intent was an 'order' for the plaintiff to prepare the drawings within the ordinary and dictionary meaning of the word 'commission' — please see *Johnson & Associates Ltd*, *Plix Products* and *Pacific Software Technology*;

(iii) the main contractor's letter of intent constituted a 'request' by the main contractor for the plaintiff to produce the drawings — please see *Pacific Software Technology*;

(iv) the main contractor's letter of intent was antecedent to the production of the drawings — please see *Pacific Software Technology*;

(v) there need not be an agreement for the precise sum of money to be paid for the drawings by the main contractor to the plaintiff — please see *Pacific Software Technology*; and

(vi) the main contractor's commission to the plaintiff, applied to the plaintiff's incomplete work in the project — please see *Pacific Software Technology*; and

(e) even if I have erred in deciding that the main contractor's letter of intent constituted an express commission by the main contractor for the plaintiff to prepare the drawings, in the alternative, there was an implied commissioning by way of the main contractor's letter of intent — please see *Pacific Software Technology*.

[34] Mr Kok had submitted that a title block is not necessarily a reservation of copyright in the drawing in question because this is not the 'express function' of the title block. In this case, the title block did not reserve any copyright in the drawings in favour of the plaintiff. Even if the title block in this case had expressly reserved copyright in the drawings in favour of the plaintiff, such a reservation has no legal effect. This is because the main contractor has copyright in the drawings by reason of operation of law (application of s 26(2)(a) of the CA) and the contents of the title block cannot therefore lawfully deprive the main contractor of such a copyright.

G. CAN THE PLAINTIFF HAVE MORAL RIGHTS IN DRAWINGS UNDER S 25(2) OF THE CA?

[35] The relevant part of s 25 of the CA reads as follows:

> 25 *Moral rights*
>
> (1) For the purposes of this section, the word 'name' includes initials or monograms.
>
> (2) *Subject to this section, where copyright subsists in a work, no person may, without the consent of the author, or, after the author's death, of his personal representative, do or authorize the doing of any of the following acts:*
>
> (a) *the presentation of the work, by any means whatsoever, without identifying the author or under a name other than that of the author;* and
>
> (b) *the distortion, mutilation or other modification of the work if the distortion, mutilation or modification —*
>
> (i) *significantly alters the work*; and
>
> (ii) *is such that it might reasonably be regarded as adversely affecting the author's honour or reputation*.
>
> ...
>
> (4) *The author or, after his death, his personal representative, may exercise the rights conferred by this section notwithstanding that the copyright in the work is not at the time of the act complained of, vested in the author or personal representative, as the case may be*.
>
> (5) *Any contravention or threatened contravention of this section in respect of a work shall be actionable at the suit of the author of the work or, if he is dead, at the suit of his personal representative, as a breach of statutory duty*.
>
> (6)*Any damages recovered under this section by a personal representative in respect of a*

contravention committed in relation to a work after the death of the author of the work shall devolve as part of the author's estate, as if the right of action had subsisted and had been vested in him immediately before his death.

... (Emphasis added.)

[36] Mr Rajindar had submitted, among others, as follows:

(a) notwithstanding the plaintiff's letter of release and the fact that copyright in the drawings vests in the main contractor, the plaintiff nevertheless has moral rights in the drawings under s 25(2) of the CA because the plaintiff is the 'author' of the drawings as understood in s 3(g) of the CA; and

(b) reliance had been placed on, among others, the following:

(i) the judgment of Azahar Mohamed J (as he then was) in the High Court case of *Syed Ahmad bin Jamal v Dato Bandar Kuala Lumpur* [2010] MLJU 1015; [2011] 2 CLJ 569; and

(ii) the definition of 'person' in s 3 of the Interpretation Acts 1948 and 1967 ('the IA') includes 'a body of persons, corporate or unincorporate'. Accordingly, a company such as the plaintiff (which has authored the drawings) can possess moral rights under s 25(2) of the CA and may exercise such rights under s 25(4) of the CA.

[37] Mr Selva has contended, among others as follows:

(a) the plaintiff cannot have any moral rights in the drawings under s 25(2) of the CA because:

(i) the plaintiff is not the author of the drawings;

(ii) moral rights under s 25(2) of the CA are only conferred on 'purely artistic and/or creative endeavour'. The plaintiff has no moral rights under s 25(2) of the CA in the drawings which are:

(1) prepared in accordance with RER and by-laws (KL); and

(2) not 'purely artistic and/or creative'; *and/or*

(iii) the wording of s 25(2),(5) and (6) of the CA means that s 25(2) of the CA only confers moral rights on an author of a work who is a natural person;

(b) the defendant had not breached the plaintiff's moral rights in the drawings because the plaintiff had issued a letter of release;

(c) the defendant can rely on reg 24 of the RER, by-laws 4, 6, 7 and 8 By-Laws (KL) as a defence to the plaintiff's claim that the plaintiff's moral rights in the drawings had been infringed; and

(d) the defendant has relied on the following, among others:

(i) *Syed Ahmad Jamal*;

(ii) Professor Khaw Lake Tee's article, *The author's Moral Rights under the Malaysian Copyright Law* [1994] 1 MLJ cxxv;

(iii) the majority judgment of the Federal Court in *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513; [1998] 2 CLJ 559; and

(iv) the High Court case of *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45; [1984] 2 CLJ 488.

[38] Firstly, as explained in the above Part F(3), the plaintiff was the author of the drawings because the plaintiff was the 'artist' of the drawings under the definition of 'author' in s 3(c) of the CA (not under s 3(g) of the CA (as submitted by the plaintiff)).

[39] Secondly, I reject the defendant's contention that moral rights in s 25(2)(a), (b)(i) and (ii) of the CA cannot be conferred on the drawings which are not 'purely artistic and/or creative endeavour'. This is because the wording of s 25(2) of the CA does not confine moral rights to a work which is 'purely artistic and/or creative'.

[40] Thirdly, I am not able to find any previous Malaysian case which has decided on the question of whether s 25(2) of the CA only confers moral rights on an author of a work who is a natural person. *Syed Ahmad Jamal* is the only Malaysian case which has interpreted s 25(2) of the CA but that case solely concerns an individual author.

[41] I have looked at the copyright legislation and case law of the following countries regarding moral rights:

(a) the Copyright Act of Singapore (Part IX, ss 187–193);

(b) UK's CDPA (Chapter 4, ss 77–89);

(c) the Copyright Act 1968 of Australia (CA 1968 (Australia)) (Part IX, ss 189–195 AZR);

(d) CA 1994 (NZ) (Part 4, ss 94–110);

(e) the Copyright Act of Canada (RSC, 1985, c C-42) (s 14); and

(f) the Copyright Act 1957 of India (s 57).

[42] My research reveals that s 190 of the CA 1968 (Australia) has expressly provided that only an individual can have moral rights in a work. I cannot find any case in Singapore, UK, NZ, Canada and India which has decided on the

issue of whether a company may be conferred moral rights in a work.

[43] I accept Mr Selva's submission that s 25(2)(a), (b)(i) and (ii) of the CA only confer moral rights on the author of a work who is a natural person. This decision is based on the following reasons:

(a) s 25(2), (4), (5) and (6) of the CA have expressly provided for the scenario when an author of a work has died and the author's personal representative may then act for the author's estate. The express reference to the author's death and the author's personal representative in s 25(2), (4), (5) and (6) of the CA, evinces Parliament's intention to confine moral rights in s 25(2) of the CA to an individual author only;

(b) s 25(2)(b)(ii) of the CA has expressly provided for 'distortion, mutilation or modification' of a work which 'might reasonably be regarded as adversely affecting the author's honour'. The word 'honour' as used in s 25(2)(b)(ii) of the CA, can only refer to an author who is a natural person (not a company). It is difficult, if not impossible, to envisage a company having 'honour' in a work within the meaning of s 25(2)(b)(ii) of the CA; and

(c) the entire provision of s 25 of the CA does not refer at all to the winding up or dissolution of a corporate author. Such an omission by the legislature is deliberate so as to confine moral rights in s 25(2) of the CA to individual authors only.

[44] Regarding the application of the definition of 'person' in s 3 of the IA, I am of the following view:

(a) Part 1 IA (which contains, among others, s 3 of the IA) applies to CA by virtue of s 2(1)(a) of the IA (because the CA has been enacted after 18 May 1867);

(b) s 2(3)(b) of the IA provides that Part 1 of the IA shall not apply where there is something in the subject or context of the legislation in question which is inconsistent with or repugnant to the application of Part 1 of the IA; and

(c) as explained in the above para 43, the wording of s 25(2), (4), (5) and (6) of the CA shows Parliament's intention to confer moral rights in a work on individual authors only. As such, the application of the wide definition of 'person' in s 3 of the IA (to include companies) will be:

(i) inconsistent with the subject or context of s 25 of the CA; *and/or*

(ii) repugnant to s 25 of the CA.

In view of the intention of legislature in s 25 of the CA, by reason of s 2(3)(b)

of the IA, I decline to apply the broad definition of 'person' (in s 3 of the IA) to s 25 of the CA. In the Federal Court case of *Kesultanan Pahang*, the majority judgments of Mohd Azmi FCJ (at pp 576 and 585–586) and Mohd Dzaiddin FCJ (at pp 616–620) (as he then was), declined to apply the wide definition of 'person' in the relevant interpretation legislation (to include companies) to s 6(i)(b) of the Sultanate Lands Enactment 1919 of Pahang.

[45] As the plaintiff cannot have moral rights in the drawings under s 25(2) of the CA, the defendant could not have infringed such rights when the defendant replaced the plaintiff's name as M & E Engineer in the title block with the defendant's name.

[46] For the sake of completeness, if a party has moral rights in a work under s 25(2)(a), (b)(i) and (ii) of the CA:

(a) a breach of an author's moral rights under s 25(2) of the CA constitutes a breach of statutory duty under s 25(4) of the CA ('breach of statutory duty') for which the author may claim damages — please see *Syed Ahmad Jamal*;

(b) there cannot be reliance on the following subsidiary legislation as a defence to a breach of statutory duty:

(i) reg 24 RER —

> A registered person shall —
>
> (a) discharge his professional duties with due skill, care, diligence and good faith;
>
> (b) at all times hold paramount the safety, health and interest of the public; and
>
> (c) take reasonable steps to reduce foreseeable adverse effects of professional engineering services on the environment; and

(ii) by-laws 4, 6, 7 and 8 by-laws (KL).

The above subsidiary legislation does not concern moral rights in a work, let alone provide a defence against a suit for a breach of statutory duty;

(c) in respect of the plaintiff's letter of release:

(i) the contents of the plaintiff's letter of release did not state that the plaintiff's letter of release had retrospective effect; and

(ii) the plaintiff's letter of release only allowed the main contractor to appoint a second engineer for the project. The defendant could not therefore rely on the plaintiff's letter of release as a defence against any claim based on a breach of statutory duty; and

(d) I am leaving open the question of whether an author's word, representation or conduct may:

(i) estop the author from enforcing the author's moral rights under s 25(2) of the CA; or

(ii) waive the author's moral rights under s 25(2) of the CA.

H. WHETHER THE DEFENDANT HAD DEFRAUDED THE PLAINTIFF IN RESPECT OF DRAWINGS

[47] The plaintiff has contended that the defendant has committed fraud on the plaintiff ('allegation of fraud') as follows:

(a) the defendant had fraudulently replaced the plaintiff's name as M & E Engineer in the title block with the defendant's name without the plaintiff's knowledge and consent ('the defendant's amendment of title block');

(b) the defendant had fraudulently used the drawings (with the defendant's name as M & E Engineer in the title block) for the project without the plaintiff's knowledge and consent;

(c) the defendant had fraudulently misrepresented that the defendant had prepared the drawings with full knowledge that the drawings were produced by the plaintiff; and

(d) Encik Muhammad, the defendant's director and mechanical engineer, had been found guilty of a disciplinary offence and had been punished by the DC.

[48] As to what amounts to a tort of fraud, I refer to the Federal Court's judgment delivered by Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in *PJTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136 as follows:

> *Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is the same in all courts, but such expressions as 'constructive fraud' are … inaccurate;' but 'fraud' … implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled.'* (per *Romilly MR in Green v Nixon* (1857) 23 Beav 530 *535 53 ER 208). Thus in Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 *& 106 it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent …'.* (Emphasis added.)

[49] In *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1;

A [2015] 5 AMR 497, at paras 48–53, the Federal Court in a judgment delivered by Richard Malanjum CJ (Sabah & Sarawak) has decided that an allegation of fraud, even if such an allegation concerns 'criminal fraud', need only be proven on a balance of probabilities and not beyond all reasonable doubt. As such, the plaintiff is only required to prove the allegation of fraud on a balance of
B probabilities.

[50] Firstly, I am of the view that the plaintiff cannot rely on the DC's decision to support the allegation of fraud. This is because the DC's decision
C merely concerned Encik Muhammad's disciplinary violation regarding the defendant's failure to obtain the plaintiff's consent before the defendant could act as the project's second engineer. There is nothing in the DC's decision to support the allegation of fraud.

D **[51]** I make a finding of fact that the plaintiff has failed to discharge the legal burden under ss 101(1), (2) and 102 of the Evidence Act 1950 to prove the allegation of fraud on a balance of probabilities. This finding is premised on the following evidence and reasons:

E (a) as explained in the above Part G, the plaintiff has no moral rights in the drawings;

(b) the main contractor has copyright in the drawings (please see the above Part F(4)). The party who can rightfully complain regarding the defendant's amendment of title block, is the main contractor (not the
F plaintiff). In this case, there is no complaint by the main contractor concerning:

(i) the defendant's amendment of title block; and

(ii) the defendant's subsequent use of the drawings without any reference to
G the plaintiff;

(c) the main contractor knew that the plaintiff had prepared the drawings. As such, the main contractor could not have been deceived in any manner by the defendant's amendment of title block; and

H (d) the main contractor had replaced the plaintiff as the consultant with the defendant. In this case, the defendant was only carrying out its duties owed to the main contractor regarding the project. There is therefore no evidence of actual dishonesty (as explained in *PJTV Denson*) on the part of the defendant in this case.

I **[52]** Even if it is assumed that the defendant had defrauded the plaintiff regarding the drawings, I find as a fact that the plaintiff has failed to discharge the legal onus to prove any loss or damage due to the defendant's fraud. In this case, the plaintiff had not adduced any evidence to prove that the defendant's

amendment of title block and the defendant's subsequent use of the drawings (without acknowledging that it was the plaintiff which had produced the drawings) had caused any loss or damage to the plaintiff's income, business, goodwill and/or reputation.

I. THE COURT'S DECISION

[53] In summary:

(a) the main contractor (not the plaintiff) has copyright in the drawings under s 26(2)(a) of the CA because the main contractor had commissioned the plaintiff to prepare the drawings. The contents of the title block cannot deny the main contractor's copyright in the drawings;

(b) s 25(2)(a), (b)(i) and (ii) of the CA only confer moral rights in a work on its author who is a natural person. Accordingly, the plaintiff cannot have moral rights in the drawings under s 25(2)(a), (b)(i) and (ii) of the CA which can be breached by the defendant; and

(c) the plaintiff has failed to discharge the legal burden to prove the allegation of fraud on a balance of probabilities.

[54] Premised on the above evidence and reasons, this suit is dismissed with costs and an allocatur fee shall be imposed on the sum of costs payable by the plaintiff to the defendant.

[55] In closing, I must:

(a) express my gratitude to the board for instructing Mr Kok to act as an amicus curiae in this case; and

(b) thank all learned counsel in this case, including Mr Kok, for their able assistance, without which this judgment is not possible.

Suit dismissed with costs.

Reported by Dzulqarnain Ab Fatar